U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 12 June 2007

BALCA Case No.: 2007-PER-00027
ETA Case No.: C-05175-09569

In the Matter of:

LUYON CORPORATION,
Employer,

on behalf of

WEI-CHUN HU,
Alien.

Certifying Officer: Dominic Pavese
Chicago Processing Center

Appearances: Gary M. Buff, Associate Solicitor
Harry L. Sheinfeld, Counsel for Litigation
Vincent C. Costantino, Senior Trial Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: **Chapman, Wood and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This matter arises under Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and the "PERM" regulations found at Title 20,

Part 656 of the Code of Federal Regulations.[1] In this case, the Employer filed an application for permanent alien labor certification for the position of Translator on July 27, 2005. (AF 8-18). The Certifying Officer (CO) issued a letter denying the application on November 15, 2005 because the job order placed with the State Workforce Agency was not completed at least 30 days prior to submission of application in violation of 20 C.F.R. § 656.17(e). (AF 5-7). On November 23, 2005, the Employer filed a letter asking for review, and arguing that it was a violation of due process for the CO to take nearly four months to issue the denial letter. The Employer argued that it had only committed a "harmless clerical error," and that if the CO had only timely advised it of the defect, it could have easily corrected the error by re-filing. Now all of its recruitment was stale. (AF 4).

On March 28, 2007, the CO denied reconsideration, finding that the denial had been valid because the end date of the Employer's 30-day job order (July 24, 2005) was less than 30 days prior to July 27, 2005, the ETA Form 9089 filing date. (AF 1). The CO then forwarded the matter to this Board. The Board issued a Notice of Docketing on April 3, 2007. The CO submitted a brief on April 27, 2007 arguing that the CO's decision to deny certification was correct, and that the length of time it takes ETA to adjudicate an application is not relevant to the question of whether the Employer complied with regulatory time requirements. The Employer did not file an Appellate Brief or statement of position.

DISCUSSION

The regulation at 20 C.F.R. § 656.17(e) provides, in pertinent part:

> (e) *Required pre-filing recruitment*. [With certain exceptions, a]n employer must attest to having conducted the following recruitment prior to filing the application:

[1] The PERM regulations appear in the 2006 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2006).

> (1) *Professional occupations*. If the application is for a professional occupation, the employer must conduct the recruitment steps within 6 months of filing the application for alien employment certification. ….
>
> (i) *Mandatory steps*. Two of the steps, a job order and two print advertisements, are mandatory for all applications involving professional occupations, except applications for college or university teachers selected in a competitive selection and recruitment process as provided in Sec. 656.18. The mandatory recruitment steps must be conducted at least 30 days, but no more than 180 days, before the filing of the application.
>
> (A) *Job order*. Placement of a job order with the SWA serving the area of intended employment for a period of 30 days. The start and end dates of the job order entered on the application shall serve as documentation of this step.
>
> * * *

Thus, the placement of a job order with a SWA is mandatory; it must have been placed at least 30 days, but no more than 180 days before the filing of the application; and it must have been at least 30 days in duration. The start and end dates of the job order must be entered on the ETA Form 9089 to document the timing of the SWA job order.

The Employer's application showed an end date for the SWA job order that was only three days prior to the date it filed the Form 9089. The Employer clearly was in violation of the regulatory requirement and does not deny the violation in its request for review. Rather, it resorts to claiming that its error was harmless clerical error, and blaming the CO for taking too long to issue a denial determination.

It is unfortunate that by the time the CO issued a denial determination, the Employer would have had to re-advertise to re-file. However, the Employer's error was not a mere clerical error. Rather, it was a substantive violation of the regulatory requirement that the SWA job order have ended at least 30 days prior to filing the application.[2] Moreover, several months before the Employer filed its application the

[2] Because the Employer was in violation of a substantive requirement of the regulations, this case is distinguishable from *HealthAmerica*, 2006-PER-1 (July 18, 2006) (en banc), in which the CO was found to

Employment and Training Administration, Office of Foreign Labor Certification had posted "FAQs" on its web site describing the PERM application process. On page 12 of those FAQs, ETA wrote:

> **Question: Must the required 30 day job order timeframe end at least 30 days prior to filing?**
>
> Yes, the 30 day job order timeframe must end at least 30 days prior to filing. While the employer is not limited to the 30 day timeframe and may choose to post the job order for a longer period, 30 days of the posting must take place at least 30 days prior to filing.

www.foreignlaborcert.doleta.gov/pdf/perm_faqs_3-3-05.pdf Thus, it cannot be argued that information about this requirement was not available to petitioning employers.

The fault for the denial in this case is not a due process error by the CO but the Employer's failure to file an application that complied with the regulatory requirement at 20 C.F.R. § 656.17(e)(1)(i). Consequently, the CO properly denied certification.

ORDER

Based on the foregoing, **IT IS ORDERED** that the Certifying Officer's denial of labor certification in the above-captioned matter is **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of Alien Labor

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have abused his discretion in refusing to permit an employer to correct a typographical error where the employer was in actual compliance with the regulation at issue. In *HealthAmerica*, the Board observed that "a CO will not be found to have abused his or her discretion in denying a motion for reconsideration of a denial … if the [Employer's] pre-existing documentation does not establish conclusively that the error was merely on the face of the Form 9089, and that there was actual compliance with the applicable substantive requirement." Slip op. at 21.

Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.